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Mine Safety and Health Administration

FMSHRC Rules that Ground Control Requirements are Subject to 'Reasonable Person' Standard

By Gary Visscher, Esq.

A decision by Federal Mine Safety and Health Review Commission (FMSHRC) on August 24, 2020 addressed the distinction between the operator's "strict liability" for violations of MSHA standards and the application of the "reasonably prudent person" test to determine whether the operator has violated a broadly worded MSHA standard.

The case, *Secretary of Labor v. The Doe Run Company,* involved an underground lead, copper, and zinc mine. In 2015 a large roof fall occurred during and in a section of the mine where scaling operations were underway. The roof fall fatally injured the operator of a mechanical scaling machine operating in the area of the fall.

MSHA cited the operator under 30 C.F.R. 57.3360 and 57.3201. Both standards are written as "performance" obligations. For example, 57.3360 requires (in part) that "[g]round support shall be used where ground conditions, or mining experience in similar ground conditions in the mine indicate that it is necessary." 57.3201 allows scaling only in "a location which will not expose persons to injury from falling material."

The Administrative Law Judge held that because the Mine Act is a "strict liability" statute, the "fact of the fatal accident itself…demonstrates a *per se* violation of the safety standard."

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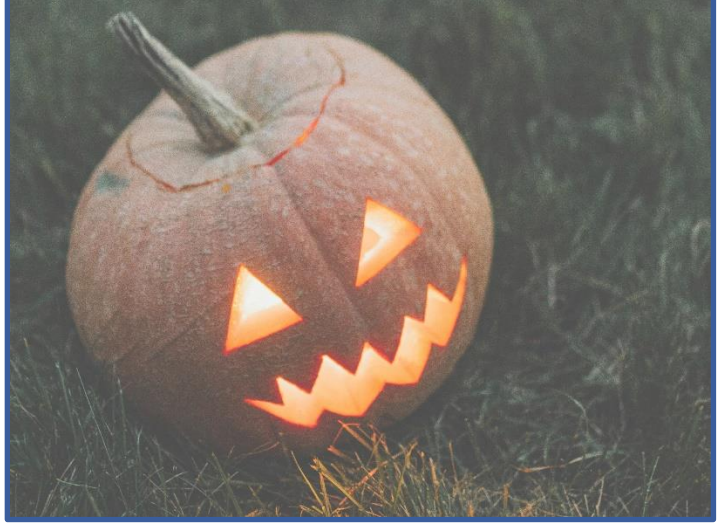

On review, the Commission held (3-2) that the ALJ had misconstrued strict liability under the Mine Act. Strict liability, the Commission said, applies once it is determined that there was a violation of the standard. However, in the case of broadly worded standards such as the ground control standards at issue and in order to meet constitutional due process and "fair notice" requirements, the determination must first be made as to whether the standard itself was violated, by applying the "reasonably prudent person" test to the operator's conduct. (The standard has sometimes been stated as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.")

The record showed that MSHA had inspected both the area of the mine and the mechanical scaler on the day before the accident and found no defects. The company was complying with its internal ground control policy, which included requirements on scaling, bolting, and drilling test holes. A very experienced roof bolter for Doe Run testified that he had installed roof bolts in the area and there were no signs of a hollow area or void above the roof, nor other problems with the roof support.

Moreover, the Commission said, the hearing record showed that the mine had no previous instance where the type of roof bolts used had failed in similar ground conditions, and the testimony from both workers and the MSHA inspector who had inspected the area the day before the accident indicated that "there was nothing that should have put the operator on notice that ground support or ground conditions in the area were insufficient or hazardous."

Similarly, with regard to the second citation (for violation of 57.3201), the Commission found the testimony, including testimony of MSHA inspectors, showed that operating the scaler in the location it was, 60 feet from the face and under bolted ground, would not have been cited but for the accident occurring.

Applying the "reasonably prudent person" test, the Commission majority held that the operator did not violate either of the cited ground control standards.

Commissioner Traynor and former commissioner Jordan wrote separate dissents. They argued that the majority had indeed undermined the Mine Act's "strict liability" with this decision, and that considerations such as the absence of previous ground control incidents at the mine went to the issue of the operator's level of negligence, not to whether the standards themselves had been violated.

U.S. Department of Labor

DOL's New "Guidance" Rule Limits OSHA/MSHA Flexibility

By Adele L. Abrams, Esq., CMSP

On August 21, the US Department of Labor finalized a rule aimed at constraining OSHA and MSHA (among other DOL agencies) from using or issuing guidance documents easily. The new rule requires the agency to undertake a "notice and comment" proceeding before issuing significant guides or guidance, which slows down the ability to respond to emergent hazards such as COVID-19, or to readily modify existing guidance based upon new scientific or technical information. The rule could also impact such issuances as OSHA handbooks, CPL documents and Letters of Interpretation, in some instances.

The final rule defines "significant" guidance as that involving impacts greater than $100 million. There is also a process for private entities to petition for existing guidance to be modified or withdrawn. The agencies within DOL are now forbidden from taking any enforcement action based on "mere non-compliance with guidance documents." This could complicate

COVID-19 enforcement, in terms of what information could be imputed to employers under OSHA's General Duty Clause.

The rule, "Prompting Regulatory Openness Through Good Guidance Rule," conforms DOL policy protocols with President Trump's October 9, 2019, Executive Order 13891, which calls on agencies to make guidance "non-binding, crafted with public input" and readily available to the public. If guidance documents did not appear on an agency's website, they were no longer in effect as of October 2019. All DOL guidance must be posted on a new agency website. The DOL rule directs its agencies to avoid using mandatory language, such as "shall" "must" or "required."

The agencies within DOL are now forbidden from taking any enforcement action based on "mere non-compliance with guidance documents."

There will be narrowly tailored situations where guidance could still be invoked by OSHA or MSHA in enforcement actions, such as to show that a person or employer had the requisite knowledge of the law, or to show consistent enforcement positions by an agency over time. The guidance can also be referenced in other legal proceedings to show an industry standard of care.

One potential snafu for DOL is that, while this was published as a final rule, the agency missed the step of issuing a proposed rule – a necessary step under the Administrative Procedure Act – although DOL could have issued a concurrent direct final rule and proposed rule under the APA; if the proposal received no adverse comment, a direct final rule can then take effect in 30 days. Given this misstep, litigation over the final rule remains possible.

California OSHA

California Passes Two Laws Increasing Employers' COVID-19 Obligations

By Josh Schultz, Esq.

On September 17, 2020, California Governor Gavin Newsom signed two bills impacting how employers respond to COVID-19. SB 1159, which is effective immediately, codifies a May Executive Order creating a rebuttable presumption that employees who test positive for COVID-19 contracted the virus at work for workers' compensation purposes. These employees are eligible for "full hospital, surgical, medical treatment, disability indemnity, and death benefits."

SB 1159 does have provisions for an employer to dispute the presumption that employees contracted the virus at work if the employer can provide evidence of: "(1) measures in place to reduce potential transmission of COVID-19 in the employee's place of employment, (2) the employee's non-occupational risks of COVID-19 infection, (3) statements made by the employee, and (4) any other evidence normally used to dispute a work-related injury."

The presumption that employees who test positive for COVID-19 contracted the virus at work exists for all employees: "(1) who test positive during an outbreak at the employee's specific place of employment; and (2) whose employer has five or more employees." The law defines an outbreak as, if, within 14 calendar days, one of the following occurs at a specific place of employment: (1) if the employer has 100 employees or fewer at a specific place of employment, 4 employees test positive for COVID-19; (2) if the employer has more than 100 employees at a specific place of employment, 4 percent of the number of employees who reported to the specific place of employment test positive for COVID-19; or, (3) a specific place of

employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection with COVID-19.

SB 1159 requires an employee to use and exhaust their paid sick leave benefits specifically available in response to COVID-19, before any temporary disability benefits kick in. If an employee does not have those sick leave benefits, the employer must provide temporary disability benefits from the date of illness without any waiting period.

Additionally, Governor Newsom signed AB 685, increasing reporting obligations for workplaces with COVID-19 exposure. This bill requires employers who have notice of a potential COVID-19 exposure to provide written notice to employees who were at the worksite at the same time as a potentially infected person. This notice requirement is triggered if "qualifying individual" provides the employer notice. The law defines "qualifying individual" as a person who can establish any of the following requirements: (1) a laboratory-confirmed case of COVID-19; (2) a positive COVID-19 diagnosis from a licensed health care provider; (3) a COVID-19 related isolation order issued by a public health official; or (4) death due to COVID-19 as determined by the County public health department. AB 685 takes effect on January 1, 2021.

Under AB 685, an employer must also provide all affected employees with information detailing COVID-19 related benefits or leave rights, as well as the employee's protections against retaliation and discrimination.

AB 685 also expands CalOSHA's role and authority when dealing with COVID-19 exposures. The California Occupational Safety and Health Act of 1973 requires CalOSHA issue an order prohibiting entry or use of any area or equipment which constitutes an imminent hazard to employees. This law authorizes CalOSHA to shut down a workplace which exposes workers to the risk of infection with COVID-19 constituting an imminent hazard to employees. The law does have exemptions for workplaces tasked with ensuring public health and safety functions or the delivery of electrical power or water.

Further expanding CalOSHA's authority, AB 685 eliminates the obligation for the Agency to make a reasonable attempt to determine and consider whether mitigating factors were taken by an employer to rebut an alleged serious violation related to COVID-19. Thus, CalOSHA will not be required to send out the letter titled "Notice of Intent to Classify Citation as Serious" before issuing a serious violation related to COVID-19.

U.S. Department of Labor

US Labor Department to Change Independent Contractor Rules

By Adele L. Abrams, Esq., CMSP

On September 25, 2020, the US Department of Labor's Wage Hour Division issued a proposed rule clarifying the definition of "employee" for purposes of the Fair Labor Standards Act (FLSA), which governs wage/hour laws as well as child labor regulations. The proposed rule and comments to date can be viewed at https://www.federalregister.gov/documents/2020/09/25/2020-21018/independent-contractor-status-under-the-fair-labor-standards-act.

The WHD changes relate to which workers can be deemed "independent contractors" and as such exempt from the payroll requirements for the host employer. The agency press release said that, once finalized, the rule will make it easier to identify employees subject to the protections of the FLSA (e.g., overtime pay) "while respecting the decision other workers make to pursue the freedom and

entrepreneurialism associated with being an independent contractor."

The primary change from current FLSA criteria is the proposed adoption of an "economic reality" test to determine a worker's status, and this test would consider whether the worker is in business for themselves (independent contractor, under this test), or whether they are "economically dependent" on a "putative employer" for worker (employee under this test).

The proposed rule also discusses two "core factors" – the nature and degree of the worker's control over the work, and the worker's opportunity for profit or loss based on initiative and/or investment. There are three other factors that would be considered in legally distinguishing the two classes of workers: (1) the amount of skill required for the work; (2) the degree of permanence of the working relationship between the worker and the potential employer; and (3) whether the work is part of an integrated unit of production. Finally, the proposed rule advises that "actual practice" will be viewed as more relevant than what might be contractually or theoretically possible in viewing the relationship.

There is a 30-day comment period (ending October 26, 2020) for the Notice of Proposed Rulemaking, and comments can be submitted through Regulations.gov to the DOL Wage Hour Division Docket at the link above. The changes to employee and independent contractor definitions may also have implications for enforcement by OSHA and MSHA in the future.

For assistance on employment law issues, contact the Law Office at 301-595-3520.

Occupational Safety and Health Administration

OSHA Issues Inspection Procedures for the Respirable Crystalline Silica Standards

By Michael Peelish, Esq.

Consistency and predictability in regulatory matters are good for employers. OSHA seems to have met that standard in issuing its Inspection Procedures on June 25, 2020. (Directive Number: CPL-02-02-080). This is in part due to the prior releases by OSHA of its Construction Industry Frequently Asked Questions issued on 8/22/2018 and General Industry Frequently Asked Questions issued on 1/23/2019. Many of OSHA's statements noted in the Inspection Procedures refer to the FAQs documents. The one caveat to the above statements is that OSHA's Request for Information issued on 8/9/2019 regarding the effectiveness of engineering controls and what else should be included in Table 1 have not been addressed by OSHA. My sense of what might come from OSHA based on the language in the RFI and the comments filed would only facilitate the implementation of the silica standard for both construction and general industry.

Having paid OSHA a compliment for its efforts, I would like to note several items that employers need to be aware of.

- The obligation for general industry employers to make available medical surveillance is now triggered by exposure above the Action Level for 30 days or more in a year rather than the Permissible Exposure Limit. This obligation became effective on 6/23/2020.

- The obligation for the hydraulic fracking operations in the oil and gas industries to

implement engineering and work practice controls will become enforceable on 6/23/2021.

- OSHA goes into greater detail on the inquiry CSHOs should make during an inspection. OSHA stresses numerous times that the CSHO should question employees in detail including work tasks that may generate RCS, their knowledge of the Exposure Control Plans, the training they received, their knowledge of respirator use, and on and on. If a CSHO receives inadequate responses, the employer will be cited for a training violation.
- OSHA confirms the use of operator rotation as an administrative control.
- With all the technical requirements the silica standard imposes, employers must have processes in place for the retention of records for medical surveillance opinions and exposure assessments. This often-forgotten obligation will lead to citations.
- OSHA also notes that citations that could lead to overexposure will generally be cited as Serious.

In summary, employers can take some comfort from the certainty the Inspection Procedures provide. In addition to complying with the technical requirements of the silica standard (e.g., engineering controls, exposure control plans), employers should also ensure that employees can demonstrate their knowledge of the silica standard and its requirements when a CSHO questions them. In this regard, our firm has presented over 100 webinars and training classes reaching thousands of employers. We have also conducted many dozens of exposure assessments and drafted exposure control plans to assist employers in fully and properly implementing the silica standard.

Mine Safety and Health Administration

Best Practices Re: Medical Surveillance for Miners

By Sarah Ghiz Korwan, Esq.

*"The first priority and concern of all in the coal or mining industry must be the **health** and safety of our most precious resource, the miner."*

~Federal Coal Mine Health and Safety Act of 1969, amended 1977

Early detection of any disease is critical for successful treatment, and even more so for the coal miner exposed to the hazardous coal dust. Starting in 1970, the coal workers' health surveillance program (CWHSP), established by the Coal Mine Health and Safety Act of 1969, has offered chest x-rays, or radiographs, for underground coal miners for the purpose of early detection and treatment of occupational pneumoconiosis (OP) to slow its progression. "If black lung is caught early, steps can be taken to help prevent it from progressing to the most serious forms of the disease," said National Institute of Occupational Safety and Health (NIOSH) Director John Howard, M.D. In 2014, the Mine Safety and Health Administration (MSHA) expanded testing by directing the NIOSH to add periodic lung function testing (spirometry) and respiratory health assessment questionnaires, and extend testing to include surface coal miners.

The goal of medical surveillance and monitoring is to protect the mines most precious resource: the miner via the miner's health. When adverse health effects are detected early, they can be reversed, prevented from progressing or limited. When the surveillance plan and mine exposure are coordinated, the miner's health is further optimized. There are two components of medical monitoring, the miner and the operator; each have unique responsibilities.

The miner will be his/her own best advocate and must be diligent in participation of the medical monitoring process. The miner should expect an interview about work history, and a physical (medical) examination. In addition, testing may include blood work, x-rays, and lung function tests. Other tests may also include an audiogram for hearing or a urinalysis for liver, kidney, urinary tract health. Medical examinations and testing should be repeated regularly, at least annually. There is no cost to the miner for the monitoring. Since 2014, testing for miners is mandatory within the first 30 days of employment, with follow up within 3 years of initial testing and follow up within two years if there is evidence of OP or reduced lung function at the three year evaluation. One element of the operator's responsibility is to post NIOSH testing availability on the mine bulletin board.

The NIOSH screenings include a work history questionnaire, a chest radiograph, a respiratory assessment questionnaire, spirometry testing, and blood pressure screening. The screenings typically take about 30 minutes and each individual miner is provided with their results. By law, each miner's results are confidential. Participation in this program gives the coal miner and easy way of checking their health; confidential reporting regarding whether or not they have radiographic evidence of CWP; and a confidential report about their lung function.

In submitting to regulation screenings, the miner also has the responsibility for getting maximum benefit from the exam. Notably, the miner must be completely honest when responding to questions about his health and health history. The worker should follow all guidelines and work practices as directed by the operator, which may include wearing personal protective equipment such as a respirator and/or earplugs, getting tested regularly, using new work practices or procedures. Finally, if the miner observes conditions which raise health (or safety) concerns, this should be reported to the mine operator.

The mine operator is also involved in the medical surveillance and screening process to target early detection and prevention. Baseline interviews and work histories are obtained from miners should be used by operators to initiate the analysis. This information supplements hazard recognition, evaluation and controls, such as engineering controls, work practice and PPE, and miner education. Because not all miners are exposed to the same hazards, operators can target high occurrence areas of the mine for improvement with information obtained from the surveillance and screening.

When health changes are detected in the miner, it is the operator's responsibility to evaluate protective measures. For example, performance controls should be compared to recommended standards. Additional air sampling should also be considered. It is also important that the operator has policies which promote PPE and ensure that PPE such as respirators. Equally important, proper task-related training and use of PPE should be regularly conducted. It is also the responsibility of the operator to ensure that engineering controls are performing as intended and miners are complying with policies. The operator should have a plan to mitigate hazards that may affect miner health. Medical results should be communicated to the miner in a confidential and timely manner. Finally, when changes have been made to mitigate health hazards, medical surveillance for miners at risk should continue to determine if the new plan is effective.

Any miner who, in the judgment of NIOSH, has evidence of the development of pneumoconiosis, must be afforded the option of transferring from his or her position to another position in an area of the mine where the concentration of respirable dust in the mine atmosphere is in compliance with the MSHA requirements in 30 CFR part 90.

Equal Employment Opportunity Commission

EEOC's September Updates on COVID and the ADA

By Diana Schroeher, Esq.

In a September 8, 2020 Press Release, the EEOC announced further updates to its technical assistance publication entitled "What You Should Know About COVID-19 and the ADA, Rehabilitation Act, and Other EEO Laws", including many new Q&As and updates to previous guidance. The EEOC enforces numerous anti-discrimination laws including the ADA. Title I of the ADA applies to private employers with 15 or more employees. It also applies to state and local government employers, employment agencies, and labor unions. State and local laws may mirror those like the ADA, and may apply to employers with less than 15 employees. The EEOC reminds employers that the ADA and other anti-discrimination laws continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the guidelines and suggestions from the CDC or other state/local public health authorities. "Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety."

This article is the third in a series of updates we have provided on the EEOC's continuing efforts to address disability issues in the time of COVID-19. See our April and June Newsletters for the first two installments. New concerns have arisen since the pandemic began, and the September 8th update provides more comprehensive guidance on these issues - tele-working, privacy, reasonable accommodation and return-to-work issues. The EEOC's September 8th update continues in the same Q&A format. Selected and summarized below are just some of the key issues addressed. Readers are strongly encouraged to closely review the EEOC publication in full, found at the following weblink: www.eeoc.gov/coronavirus. The March 27, 2020 EEOC Webinar referenced in the responses is also available at the covonavirus weblink.

Q. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) when evaluating an employee's initial or continued presence in the workplace? (4/23/20; updated 9/8/20 to address stakeholder questions about updates to CDC guidance)

A. The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with COVID-19 will pose a direct threat to the health of others. Therefore, an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. . . . Testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard.

Consistent with the ADA standard, employers should ensure that the tests are considered accurate and reliable. . . . Because the CDC and FDA may revise their recommendations based on new information, it may be helpful to check these agency websites for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Note that a positive test result reveals that an individual most likely has a current infection and may be able to transmit the virus to others. A negative test result means that the individual did not have detectable COVID-19 at the time of testing. A negative test does not mean the employee will not acquire the virus later. Based on guidance from medical and public health authorities, employers should still require–to the greatest extent

possible–that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

Q. May an employer invite employees now to ask for reasonable accommodations they may need in the future when they are permitted to return to the workplace? (4/17/20; updated 9/8/20 to address stakeholder questions)

A. Yes. Employers may inform the workforce that employees with disabilities may request accommodations in advance that they believe they may need when the workplace re-opens. . . . If employees make advance requests, employers may begin the "interactive process" – the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed. If an employee chooses not to request accommodation in advance, and instead requests it at a later time, the employer must still consider the request at that time. See related Q&A on Accommodation and workplace flexibility issues.

Q. When an employer requires some or all of its employees to telework because of COVID-19 . . . , is the employer required to provide a teleworking employee with the same reasonable accommodations for disability under the ADA . . . that it provides to this individual in the workplace? (9/8/20; adapted from 3/27/20 Webinar Question 20)

If such a request is made, the employer and employee should discuss what the employee needs and why, and whether the same or a different accommodation could suffice in the home setting. For example, an employee may already have certain things in their home to enable them to do their job so that they do not need to have all of the accommodations that are provided in the workplace.

Also, the undue hardship considerations might be different when evaluating a request for accommodation when teleworking rather than working in the workplace. A/*/* reasonable accommodation that is feasible and does not pose an undue hardship in the workplace might pose one when considering circumstances, such as the place where it is needed and the reason for telework. For example, the fact that the period of telework may be of a temporary or unknown duration may render certain accommodations either not feasible or an undue hardship. There may also be constraints on the normal availability of items or on the ability of an employer to conduct a necessary assessment.

As a practical matter, and in light of the circumstances that led to the need for telework, employers and employees should both be creative and flexible about what can be done when an employee needs a reasonable accommodation for telework at home. If possible, providing interim accommodations might be appropriate while an employer discusses a request with the employee or is waiting for additional information.

For more information on the EEOC COVID-19 Guidance, or other employment issues, please contact Diana Schroeher at the Law Firm.

Federal Motor Carrier Safety Administration

FMCSA Hours of Service Rule Changes Take Effect

By Adele L. Abrams, Esq., CMSP

On June 1, 2020, the Federal Motor Carrier Safety Administration (FMCSA) published a final rule modifying the “Hours of Service” (HOS) regulations applicable to commercial motor vehicle drivers (CMV or CDL drivers). The rule becomes effective on *September 29, 2020*, and relaxes certain

requirements. Until the effective date, the older and stricter rules must be followed. FMCSA, part of the US Department of Transportation, has published the rule and some guidance on its website: https://www.fmcsa.dot.gov/regulations/hours-of-service. Specific guidance can be obtained via email at hoursofservice@dot.gov.

There are four key changes made to existing rules, designed to give commercial drivers greater flexibility while maintaining safety standards on the road. DOT estimates that the revisions will provide nearly $274 million in annualized cost savings to the U.S. economy. The final rule was developed via notice-and-comment rulemaking and so is binding on the regulated community, unlike agency guidance (which can be modified or withdrawn at any time). The rulemaking was controversial, and the agency received nearly 8,000 comments from the public during the promulgation period. The HOS regulations being modified are codified at 49 CFR Part 395, which prescribes driving limits for commercial drivers.

The four areas affected by the HOS final rule, explained in detail below, are:

- Short-Haul Exception
- Adverse Driving Conditions Exception
- 30-Minute Break Requirements, and
- Sleeper Berth Provision.

Short-Haul Exception: The FMCSA short-haul exception previously had a maximum allowable workday of 12 hours. That has been expanded to 14 hours. The distance that the short-haul driver may operate has been extended from a 100-mile (air-mile) radius to a 150-air-mile radius. An "air mile" is internationally defined as a "nautical mile" – equivalent to 6,076 feet.

When operating under the short-haul exception, drivers who are released within their 14-hour duty period (and who drive no more than 11 driving hours within that period) are now permitted to keep a time record instead of recording time in a graph grid or using an Electronic Logging Device (ELD). If this time record alternative is used, the record must include the total time for the preceding 7 days, and these records must be maintained for 6 months.

Once a driver no longer meets the short-haul exception (e.g., they drive too far or work too many hours), then the driver must use a regular log or ELD for that day (49 CFR 395.8). If the driver must complete a log but falls outside the exception for 8 or fewer days within the previous 30 days, he/she can use a paper log with a graph grid. If the driver exceeds the hours for more than 8 days within the previous 30 days, then a ELD must be used to record time for that day.

In addition, to meet this exception, the shift must start and end in the same location, and the driver must have at least 8 hours off if they are transporting passengers, or 10 hours off if they are a property carrier, between duty periods. The record must include the start and end times for the day, and the total hours on-duty on the record. Those provisions are unchanged from the original standard 49 CFR 395.1(e). In addition, the new HOS rule did not change the *non-CDL* short-haul exception in this section.

Adverse Driving Conditions Exception: The adverse driving conditions exception extends the duty-day by two hours when adverse driving conditions are encountered; this is in addition to the extra two hours of driving time already allowed. The adverse driving conditions two-hour extension will apply to both property-carrying (11 hour driving limit and 14-hour driving window) and passenger-carrying (10 hour driving limit and 15-hour on-duty limit) motor carriers. Under the old rule, the maximum driving limits had been 11 hours for property carriers and 10 hours for passenger carriers. So the bottom line is that, under the final rule, when using this exception, drivers can driver up to 13 hours within a 16-hour driving window (property) or can drive 12 hours within a 17-hour on-duty period (passenger).

The final rule also redefined what constitutes "adverse driving conditions." The *new* test covers snow, ice, sleet, fog, or other adverse weather conditions or

unusual road or traffic conditions that were not known, or could not reasonably be known, to: (1) a driver immediately prior to beginning the duty day or immediately before beginning driving after a qualifying rest break or sleeper berth period, or (2) a motor carrier immediately prior to dispatching the driver. The *old* test required that none of the conditions could have been apparent on the basis of information known to the dispatcher at the time the run started.

FMCSA stresses in guidance that the exception cannot be used to cover delays caused by detention time, breakdowns or enforcement inspections, nor does it apply to loading/unloading activities. For road construction-related delays, the adverse conditions exception only applies where the driver could not have known of the construction delays before they started driving.

30-Minute Break Requirement: The 30-minute break requirement can be satisfied now by an on-duty *non-driving* break (in addition to an off-duty break). The requirement for property-carrying drivers is applicable in situations where a driver has driven for a period of 8 ours without at least a 30-minute interruption. In the past, a driver had to satisfy the 30-minute break by spending time off-duty or in a sleeper berth. Under the revised regulation, the 30-minute break includes time either off-duty, in the sleeper berth, or on-duty but not driving. The 30-minute break must be consecutive but can include a combination of these three options. Short, non-consecutive periods cannot be combined to reach the 30 minutes of non-driving time, however.

Sleeper Berth Provision: This provision allows commercial drivers to split their 10-hour off-duty period in different ways. Options now include splits such as 7/3, 8/2, 7.5./2.5 hours – provided that one off-duty period (whether in or out of the sleeper berth) is at least 2 hours long, and the other involves at least 7 consecutive hours spent in the sleeper berth. The periods must total 10 hours, and when used together, neither time period counts against the maximum 14-hour driving window. The order of the qualifying breaks does not matter, so the 2 hour break can occur before or after the 7+ hour period in the sleeper berth.

Previously, only the 8 hours in-berth counted toward the exclusion from the 14-hour driving window, but the other hours were included. The new rule allows the pairings outlined above, but FMCSA notes that an 8-hour sleeper berth period by itself can no longer be excluded from the 14-hour driving window. In addition, it is important to note that the final rule does not change sleeper berth provisions that are unique to drivers of CMVs transporting passengers (49 CFR 395.1(g)(3)).

Finally, FMCSA notes that the minimum requirements in its previous Electronic Logging Device final rule did not require ELDs to identify hours of service violations, but some ELD providers added on this feature. If an ELD is not updated to reflect the new HOS rules, the ELD may inaccurately identify hours of service violations. Motor carriers should contact their ELD provider with any questions about their displays.

For more information on workplace or transportation safety issues, contact Adele Abrams at safetylawyer@gmail.com.

Occupational Safety and Health Administration

Commission Issues Series of Decisions on LOTO Machine Guarding

By Gary Visscher, Esq.

In a series of three decisions, the Occupational Safety and Health Review Commission (OSHRC) emphasized that a violation of the machine guarding requirement of OSHA's Lockout Tagout (LOTO) standard requires OSHA to prove that employee access and exposure to the moving part of other hazard is not just possible but "reasonably predictable." In all three cases, an employee suffered

an injury from contacting moving machine parts. The Commission's decisions emphasize that the fact of an injury did not prove that the standard was violated. An employee's exposure to the hazard must be reasonably predictable in normal operations.

In *Aerospace Testing Alliance*, (OSHRC, 9/21/2020), an employee was operating a shearing machine at a sheet metal shop. The machine had pistons, each with a guard to prevent an operator from putting his or her hand under the piston, to hold the metal sheet in place during cutting. The injury occurred when an operator removed his glove to slide his finger under the guard and placed his fingers under one of the pistons during the machine's operation. At the same time, he inadvertently pressed the shear's foot pedal, causing the piston to lower and crush the tip of his finger.

The Commission's decisions emphasize that the fact of an injury did not prove that the standard was violated.

In *Wayne Farms*, (OSHRC, 9/22/2020), an employee lifted a grate and reached inside a hopper of a breading machine to dislodge flour from the side of the hopper. As he did so, paddles at the bottom of the hopper activated and caught his smock, pulling his arm and hand into the mechanism. The evidence at the hearing showed that employees were not required or allowed by the company's safety procedures to lift the grate and put their hands inside the hopper, and on previous occasions where the employee had attempted to manually clean the hopper, he had been told not to do so anymore. The hopper was automatically cleaned out at the end of each day and that "if flour was present on the inside of the hopper [during a work shift], it could be knocked off by the striking the outside of the machine."

In the third case, *Dover High Performance Plastics*, (OSHRC, 9/25/2020), a lathe operator at a plastics parts manufacturer was injured when he reached into a milling machine to adjust a part being milled. The machine was programmed to start and stop automatically, with a limited amount of time between cycles. The operator did not withdraw his hand before the next cycle began and the cutting tool cut his hand. After the accident, the lathe was reprogrammed to require that operators manually initiate the next cycle.

All three employers were cited for violations of 1910.212 (a)(1), which states in relevant part, "One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks."

The Commission described the standard as a "performance standard" in that it "states the result required rather than specifying that a particular type of guard must be used" and "require[s] an employer to identify the hazards peculiar to its own workplace and determine the steps necessary to abate them."

In *Aerospace Testing Alliance*, the Commission relied on the wording of the standard to require that exposure to the hazard was "reasonably predictable." The Commission said that the word "protect" in 1910.212 (a)(1) was not intended to require guards that prevent an employee from intentionally circumventing the guard. ("In a case such as this one, a compliant guard may not always, nor does it need to, prevent intentional exposure to the hazard.") Citing precedents, the Commission said that noncompliance with the guarding requirement requires proof that exposure to the hazard is reasonably predictable during normal operations.

Those previous cases require that exposure be "reasonably predictable either by operational necessity or otherwise (including inadvertence)." The Commission found that there were other, acceptable ways that employees could and were supposed to use to hold a small metal piece in place which did not require putting one's hands under the piston and guard (and included a photo of this area of the machine to illustrate the point). The ALJ had found that the hold down piston guards were inadequate because they do

not prevent an employee's fingers from "inadvertently slipping under the guard during normal operations." The Commission disagreed; this was not inadvertence, the Commission said. The employee "had to first remove his glove before *intentionally* placing his fingers under the piston guard."

In *Wayne Farms*, the Commission relied on the traditional elements that OSHA must prove for a violation: that the cited standard applies, that there was a failure to comply with the standard, that employees were exposed to the violative condition, and that the employer knew or should have known of the violative condition. The Commission said that proving the third element – exposure to the violative condition – under 1910.212 (a)(1) "hinges on whether the operator's actions were reasonably predictable given the machine's normal operations."

The Commission affirmed the ALJ's factual finding that manual cleaning of the hopper and placing one's hands below the grate was not required during the machine's normal operations. The Commission found that "the record establishes that [the injured employee's] act of reaching into the moving parts of the hopper … was the intentional, idiosyncratic behavior of only one employee."

In *Dover High Performance Plastics*, the Commission affirmed OSHA's citation for the guarding of the lathe but vacated the citation insofar as it applied to two mills. The Commission found that at the time of the employee's injury, it was reasonably predictable that an employee would not complete the task of removing the plastic part before the next production commenced. However, the Commission found that regarding the mills, there was no evidence in the record that exposure to the hazard was reasonably predictable.

OSHA argued that employee exposure *could* occur, for example, during cleaning of the machine or if an employee standing outside the machine was accidentally bumped by another employee. The Commission said that those arguments were entirely speculative and the company had in fact submitted contrary evidence regarding the machine cleaning. The Commission also cited testimony from company officials that they had not experienced or heard of any incidents involving employees bumping into each other in the manner that OSHA suggested since the plant opened in 1990.

The citation that OSHA issued to Dover High Performance Plastics was issued as a willful violation. The Administrative Law Judge upheld the willful characterization, based on the company having received a prior machine guarding citation in 2007, and because after the 2012 accident involving the lathe operator, the company did not require the machine doors to be closed during operation but only required the operator to manually start the production cycle. The Commission found that the company's actions, changing the machine programming from an automatic timed start to requiring a manual start, was "objectively reasonable" action to eliminate all exposure to the moving parts, and compliance did not require that the doors be closed during machine operation. Based on the company's actions (which occurred after the accident), the Commission recharacterized the citation for the lathe machine guarding from willful to serious.

Occupational Safety and Health Administration

Public Citizen Wins FOIA Suit on Injury Data, Files New FOIA Suit Over COVID-19 Enforcement

By Adele L. Abrams, Esq., CMSP

Public Citizen, a public interest group, has sued OSHA to uncover records pertaining to the agency's development of enforcement procedures that initially

promised not to take enforcement action against the poultry industry if the employer made "good faith efforts" to comply with COVID-19 workplace safety guidance. A complaint was filed September 8, 2020, in US District Court (D-DC) alleging that the US Department of Labor failed to timely respond to the pending Freedom of Information Act (FOIA) request for communications internally within OSHA/DOL and also with trade associations and representatives of the protein sector. The FOIA request was initially filed on May 1, 2020, seeing all records pertaining to an April 2020 memo where OSHA promised "enforcement discretion" against employers that followed OSHA and CDC guidance on COVID-19 in the workplace.

Earlier this summer, Public Citizen prevailed in another FOIA action against OSHA, in which it sought the employer injury/illness data that had been submitted electronically to OSHA under its revised E-Recordkeeping rule (29 CFR Part 1904), along with a second public interest group that also sued. *See Center for Investigative Reporting v. Department of Labor*, No. 4:18-cv-02414-DMR, 2020 WL 2995209 (N.D. Cal. June 4, 2020); *Public Citizen Foundation v. United States Department of Labor*, No. 1:18-cv-00117 (D.D.C. June 23, 2020).

The agency was ordered to release the employer data to Public Citizen, and rather than appealing, OSHA also posted the data on its own website. That information is now public facing and searchable by employer name to determine its injury/illness history. The searchable website include CY 2016, 2017 and 2018 data so far, and is: https://www.osha.gov/Establishment-Specific-Injury-and-Illness-Data.

OSHA issued a disclaimer concerning the data, stating "The fact that an employer provided data does not mean that the employer is at fault, that the employer has violated any OSHA requirements, that OSHA has found any violations, or that the employee is eligible for workers' compensation or other benefits."

Mine Safety and Health Administration

MSHA Stakeholder Meeting – "Pleased, But Not Satisfied"

By Michael Peelish, Esq.

MSHA held its quarterly Stakeholder Meeting on September 17, 2020 and went through the familiar agenda. However, there was a message from Assistant Secretary Zatezalo that needs to be mentioned, "I am pleased but not satisfied" with the industry's safety performance.

Regarding accidents and injuries, MSHA focused on fatal injuries involving fall from equipment. Since 2015, seven fatalities occurred while falling from equipment and 865 non-fatal days lost occurred while mounting and dismounting equipment which suggests that MSHA is focusing on the right tasks. MSHA has concluded the root cause of these accidents and injuries is safe access/egress to equipment, failure to use fall protection PPE, inadequate oversight, and inadequate training.

Several interesting points were made by MSHA regarding these accidents and injuries. Older miners are at higher risk when mounting and dismounting equipment, with 6 of the 7 fatalities occurring to miners over 50 years of age. MSHA has opined that grip strength and flexibility generally decrease with age and that older miners are at risk when using access systems that rely on grip strength flexibility. The second point is that supervisors are accounting for greater percentage of fatalities which concerns MSHA since these are the folks that need to set the right safety example.

Timothy Watkins, Administrator for Mine Safety and Health Enforcement, noted that MSHA has had success with other initiatives such as the powered haulage and electrical to reduce accidents and injuries. Based on this approach, Mr. Watkins stated that

MSHA has a new initiative/emphasis program addressing fall from heights. He further stated that MSHA has issued over 72 imminent danger orders to operators for fall protection violations over the last 18 months. The education and policy group provided a review of the resources MSHA has available for mine operators with a focus on fall protection.

Fall accidents and injuries are not easy for mine operators to address. For instance, as it involves truck tarping, there are engineering controls such as safe racks, tethers, platforms, or mobile platforms that operators can deploy. While these are good solutions, they are not always implemented even when made available. That is where mine operators have to do a better job of training and oversight of the fall protection standards with its employees and contractors.

MSHA is moving forward even through the Covid pandemic:

- 248 mines out of almost 13,000 mines have reported a Covid positive.
- The Agency's review of its program policy manual is ongoing and will combine 29 manuals to 14 manuals with more guidance versus restatement of the regulations.
- A respirable quartz standard will not be issued this year.

To a question from the audience, MSHA noted that since January 2018, there have been 9,170 citations conferenced evenly distributed between coal and metal/non-metal. A breakdown of results is 62% are upheld; 29% modified; and 10% vacated.

Over my 30 years in this industry, MSHA appears to be functioning organizationally as well as I can remember. Under the leadership of Assistant Secretary Zatezalo, MSHA is seeing the results of focused efforts. Just to repeat, "Pleased, But Not Satisfied."

Cannabis Corner

Updates Affecting Marijuana in the Workplace

By Adele L. Abrams, Esq., CMSP

Federal Employees

The US Department of Health & Human Services (HHS) has proposed amending workplace drug testing guidelines to permit federal employers to analyze employees' hair for the presence of illicit drug use. The hair follicle tests would be used for pre-employment as well as random drug screenings, although it is long recognized that this method of testing is susceptible to variability in results due to confounding factors such as hair color, skin color, exposure to high humidity or even exposure to second hand cannabis smoke.

The proposal received a heated response from cannabis supporters who noted that changing the governmental method of testing to a method that can render disparate results based on race, at a time when there is a push for racial equity, is nonsensical and will deny persons of color employment opportunities in the federal government. Historically, federal officials had avoided including hair follicle tests as a part of workplace testing because it is of limited probative value – it can capture drug use in the past but does not capture very recent use, and so cannot indicate current impairment. The HHS proposed rule tacitly recognizes this, noting "a positive hair test alone, without corroborating evidence, may be vulnerable to legal challenge." The comment period on the drug testing proposal closes November 9, 2020.

THC Blood Tests and Impairment

A Canadian study has reported that the detection of THC in the blood at levels exceeding 2 ng/ml may persist for longer periods of time that originally anticipated, and therefore is not necessarily indictive of

impairment or recent cannabis exposure. The study was published in the journal, *Drug and Alcohol Dependence*, and was conducted by researchers at University of British Columbia.

The researchers noted that in all studies where participants were observed for over a day, blood THC levels in some participants remained detectable during several days of abstinence, with some subjects still testing positive for up to 30 days after their most recent cannabis use. They also noted a "double hump" pattern, where THC levels that had dropped, rose again at the end of the week despite no new use of the drug. The study could have implications for both workplace impairment assessment and also for enforcement of DUI/DWI laws in states currently using a "per se" blood THC level to criminalize behavior based on trace amounts of THC in the blood analysis.

Occupational Safety and Health Administration

New OSHA Policy Narrows Test for Reporting COVID Hospitalizations

By Josh Schultz, Esq.

On September 30, 2020, OSHA issued guidance clarifying an employer's obligation to report COVID-19-related hospitalizations. The agency published a new set of Frequently Asked Questions (FAQ), clarifying the meaning of the term "incident" as it relates to work-related coronavirus in-patient hospitalizations and fatalities. In the new FAQ, OSHA states that for cases of COVID-19, the term "incident" means an exposure to SARS-CoV-2 in the workplace. OSHA regulations, at 29 CFR 1904.39(b)(6), require employers to report in-patient hospitalizations to OSHA only if the hospitalization "occurs within 24 hours of the work-related incident." For employers, this means that they are only obligated to report in-patient hospitalizations to OSHA due to COVID-19 if the hospitalization occurs within 24 hours of an exposure to SARS-CoV-2 at work.

OSHA's FAQ further clarified that employers have 24 hours to report from the time the employer determined that an employee was in-patient hospitalized due to COVID-19. "If an employer learns that an employee was in-patient hospitalized within 24 hours of a work-related incident, and determines afterward that the cause of the in-patient hospitalization was a work-related case of COVID-19, the case must be reported within 24 hours of that determination."

The September 30th FAQ is also clear that the reporting limitation applies only to OSHA's immediate reporting requirements; employers must still record work-related confirmed cases of COVID-19, as required by 29 CFR 1904.4(a), on OSHA's Form 300.

In an April Enforcement Memo, OSHA stated that the agency would not enforce the recording and reporting requirements against employers (other than those in the healthcare industry, emergency response organizations, and correctional institutions) with respect to COVID-19 unless (1) there is objective evidence that a COVID-19 case may be work-related (i.e., a number of cases developing among employees who work closely together without an alternative explanation), and (2) the evidence was reasonably available to the employer. The memo listed examples of "reasonably available evidence" as information given to the employer by employees, and information that an employer learns regarding its employees' health and safety in the ordinary course of managing its business and employees.

Additionally, OSHA published an FAQ on July 15 interpreting the hospitalization reporting requirement of 29 CFR 1904.39(b)(6). This FAQ required that employers "must report the hospitalization within 24 hours of knowing both that the employee has been hospitalized and that the reason for hospitalization was

COVID-19." However, OSHA subsequently removed the FAQ from the agency's website.

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Employment Law

What The F#*%! NLRB Addresses Offensive Outbursts in Workplace

By Adele L. Abrams, Esq., CMSP

In a ruling this summer, the National Labor Relations Board (NLRB) modified the standard for determining whether employees have been lawfully disciplined or discharged after making "abusive" or "offensive" statements in the course of activity that is otherwise protected under the National Labor Relations Act. The language at issue include profane, racist and sexually unacceptable remarks.

The decision came in a case brought against *General Motors*, and the Board held that cases involving offensive or abusive conduct will now be decided under the *Wright Line* standard, used for 40 years previously by the NLRB in "mixed motive" cases where, if the NLRB proves that the employee's protected activity was a motivating factor in discipline or discharge, the employer can then rebut by proving that it would have taken the same action even in the absence of the protected activity. One method of demonstrating this is showing consistent discipline of others who did not engage in the protected aspect of the activity but engaged in similar non-protected misconduct.

The new test replaces other decisions that came after *Wright Line* and also addressed this situation (*Atlantic Steel*, which addressed encounters with management, and *Clear Pine Mouldings*, which addressed offensive statements and conduct on a picket line). These older tests accounted for impulsive behavior when engaging in protected activity, looked at whether the employer's unfair labor practices had provoked the conduct, and often resulted in workers' reinstatement for the offensive language or conduct. The federal EEOC had previously commented on the then-pending General Motors case, noting that the old tests required the NLRB to protect worker's offensive speech to an extent that could hamper employers' ability to tamp down on potential harassment under federal anti-discrimination laws.

The *GM* ruling, which was decided by a unanimous all male GOP NLRB, is significant in the #MeToo and BLM protest era, and some including former NLRB Chair Mark Pearce, responded that the NLRB is trying to seize on inflammatory language to water down worker protections when striking or protesting workplace practices. The *GM* case facts involved a black employee who was suspended for incidents where he "engaged in profane or racially offensive conduct toward management or at bargaining meetings."

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